In the Supreme Court of the United States

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OCTOBER TERM, 1941

No. 153

LUCKENBACH STEAMSHIP COMPANY, INC., a corporation, as Owner of the Steamship "EDWARD LUCKENBACH",
Petitioner,

vs.

SOCIETA ANONIMA PARTECIPAZIONI INDUSTRIALI COMMERCIALI, a corporation, NAVIGAZIONE LIBERA TRIESTINA, S.A., a corporation, SPETT SOCIETA ANONIMA DI SICURATA FRA ARMATORI, a corporation, (Owners and Underwriters of the Motorship "FELTRE"),

HAWAII LIQUOR COMPANY, LIMITED, et al., (Cargo Claimants),
Respondents.

PETITION FOR WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Ninth Circuit.

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Respondents.

PETITION FOR WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Ninth Circuit.

*The names of the other cargo claimants fill three pages of the printed record (R. 78-81) and are omitted from the caption for the sake of brevity.

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petitioner Luckenbach Steamship Company, Inc., a corporation organized under the laws of the State of Delaware, and owner of the steamship "Edward Luckenbach", respectfully applies to this Honorable Court for a writ of certiorari directed to the United States Circuit Court of Appeals for the Ninth Circuit, requiring it to certify this cause to this court for review and correction.

A.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This is a cause in admiralty arising out of a collision between the petitioner's vessel, the intercoastal steamship "Edward Luckenbach", and the Italian motorship "Feltre" that occurred in the Columbia River on February 17, 1937.

The litigation originated in the United States District Court for the Northern District of California where petitioner sought exoneration from and limitation of liability against claims by the owners and underwriters of the "Feltre" and her cargo in excess of one million dollars (R. 19, 33, 52). Petitioner also filed a cross-libel to recover its damages from the owners and operators of the "Feltre" (R. 184).

After a reference to a Commissioner who heard the testimony, mostly by deposition, and rendered a report, the District Court overruled exceptions to the Commis-

sioner's report and entered an interlocutory decree of mutual fault, holding both vessels to blame for the collision and granting petitioner a limitation of liability (R. 288, 298). The actual amount of damages, and the value of petitioner's vessel and pending freight for the purpose of limitation of liability, are yet to be determined, as the appeal was taken from the interlocutory decree (R. 302, 313).

Petitioner appealed to the United States Circuit Court of Appeals for the Ninth Circuit from that part of the decree that held the "Edward Luckenbach" at fault, and that court affirmed, by a divided court, the decree of the District Court against the "Edward Luckenbach" (R. 1415, 1416, 1460). A petition for rehearing was denied by the Circuit Court of Appeals (R. 1461).

The owner, operator, and underwriters of the "Feltre" filed a cross-appeal, but the court unanimously affirmed the decree of fault against that vessel (R. 1427, 1460).

The faults of the "Feltre", nearly all of which were established by uncontradicted testimony, were found by the District Court and affirmed by the Circuit Court of Appeals, as follows:

1. *The "Feltre" did not have a proper lookout, no lookout being stationed in the bow of the ship and no member of the watch being stationed elsewhere for the sole purpose of acting as lookout* (R. 1420). This fault was established by the "Feltre" testimony (R. 216-220) and was a positive violation of the statutory Rules of the Road (Art. 29, Inland Rules; 33 U.S.C. §221; Act of Congress, June 7, 1897, c. 4, §1, 30 Stat. 102).

The Circuit Court of Appeals found that the "Feltre" did not hear the "Edward Luckenbach's" one-blast passing signal that was sounded in response to the one-blast signal from the "Feltre", and found, furthermore, that if the "Feltre" had maintained a proper lookout it was entirely possible that she would have heard the one-blast signal and avoided the confusion in her pilot's mind that led to the collision (R. 1422).

2. *The "Feltre" failed to sound a danger signal and to stop and reverse as required by the attendant conditions* (R. 1421).

The failure of the "Feltre" to sound a danger signal and to stop when she did not hear the "Edward Luckenbach's" one-blast answering signal was likewise established by the "Feltre" testimony (R. 220-224) and was a positive violation of the Rules of the Road (Art. 18, Rule III, Inland Rules; 33 U.S.C. §203; Act of Congress, June 7, 1897, c. 4, §1, 30 Stat. 100).

3. *The "Feltre" sounded a two-blast signal and altered her course to her own left before the "Edward Luckenbach" assented* (R. 1421).

This maneuver, which was established by the testimony of the "Feltre" pilot (R. 224-226), was a positive violation of the Rules of the Road. Those rules required each vessel to pass to the right (Art. 18, Rule I, Inland Rules; 33 U.S.C. §203; Act of Congress, June 7, 1897, c. 4, §1, 30 Stat. 100).

4. *The "Feltre" violated the "narrow channel" rule by swinging to her own left across the Upper Cottonwood Island Range* (R. 1421).

The "narrow channel" rule required each vessel to keep to her own right-hand side of the channel (Art. 25, Inland Rules; 33 U.S.C. §210; Act of Congress, June 7, 1897, c. 4, §1, 30 Stat. 101).

5. The "Feltre" was also found at fault in other respects, in that she proceeded at an immoderate speed, that she failed to allow the "Edward Luckenbach" a safe margin for passing, and that she failed to take any compass bearings of the "Edward Luckenbach" as the two vessels approached each other (R. 1421).

6. The findings established that the vessels came into collision to the *right* of the Upper Cottonwood Island Range, proceeding *upstream*, that is, between the range and a point 300 feet to the *right* of the range (R. 1420). This was *on the "Edward Luckenbach's" proper side of the channel,* and established the "Feltre's" violation of the "narrow channel" rule (Art. 25, Inland Rules (supra)).

The Circuit Court of Appeals also affirmed the decision of fault against petitioner's vessel, the "Edward Luckenbach", but, as the majority opinion shows, the court confined its consideration to the evidence on a single issue, the alleged violation of the "narrow channel" rule, and decided against petitioner's vessel upon evidence that the majority of the court stated was in *"sharp conflict"*, only *"fairly clear"*, merely *"persuasive"*, and that *"may be doubted"*.

The brief majority opinion, without any carefully considered review of the evidence, *shows on its face,* by the express statements of the court, that the evidence against

the "Edward Luckenbach" on the alleged violation of the "narrow channel" rule (the only point considered by the court) was *neither clear nor convincing* nor sufficient to establish fault on the part of that vessel.

The majority of the court stated that:

> "the evidence is in *sharp conflict*" (R. 1421)
>
> * * * * * * *
>
> "In any event it is *fairly clear* that when the vessels collided the Luckenbach was being navigated too close to midchannel" (R. 1424)
>
> * * * * * * *
>
> "However, it *may be doubted* whether the Luckenbach actually crossed the course of the Feltre in the manner testified. It seems rather *more probable*", etc. (R. 1426)
>
> * * * * * * *
>
> "But *whatever may be the fact,* the record as a whole is *persuasive* that the Luckenbach was so far off her proper course", etc. (R. 1426)

There is no statement or finding in the majority opinion that the evidence against the "Edward Luckenbach" was *clear and convincing* or free from doubt, as required under the decisions of this court, nor was there any finding against that vessel based upon such evidence. The majority opinion cited no authority to sustain its decision against the "Edward Luckenbach".

The able dissenting opinion of the senior circuit judge, a Naval Academy graduate with a wide experience over many years in collision cases, reviewed the evidence at length and showed conclusively, with citations of the decisions of this court, that the evidence failed to establish any fault on the part of the "Edward Luckenbach".

In sharp contrast with the statements of *doubt* in the majority opinion, the dissenting opinion concluded, after a careful review of the evidence, that there was "*no clear, convincing proof* that the Luckenbach was in the wrong" (R. 1439-40) and that "the point of collision* is *virtually decisive of the case*" (R. 1435).

Petitioner is applying for a writ of certiorari to review and correct the decision of the Circuit Court of Appeals upon the ground that the decision of the Circuit Court of Appeals, as shown by the majority opinion, was clearly in conflict with the settled law as established by the decisions of this court.

B.

JURISDICTIONAL STATEMENT.

The general jurisdictional facts are set forth in the preceding summary of the matter involved, and show that the instant cause, which arose out of a marine collision upon the navigable waters of the United States, is within the admiralty jurisdiction of the courts of the United States.

The decree of the United States Circuit Court of Appeals for the Ninth Circuit was entered on March 23, 1942 (R. 1461). A timely petition by petitioner for a rehearing was denied by the Circuit Court of Appeals on April 20, 1942 (R. 1461).

The majority opinion of the Circuit Court of Appeals will be found in the record at pages 1416-27, inclusive,

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*On the "Luckenbach's" proper side of the channel.

and the minority opinion at pages 1427-60, inclusive. The opinions will also be found in 127 F. 2d, pp. 86-100 inc. The opinions are also included in the accompanying brief for purpose of argument and for convenient reference by the court.

Jurisdiction of civil causes of admiralty and maritime jurisdiction was vested in the courts of the United States by the *Act of Congress, September 24, 1789, c. 20, §9, 11; 1 Stat. 76, 78; 28 U.S.C. §371.*

The review of the decision of the Circuit Court of Appeals by this court on certiorari is authorized by *Section 240 of the Judicial Code, 28 U.S.C. §347; Acts of Congress: Mar. 3, 1891, c. 517, §6, 26 Stat. 828; Mar. 3, 1911, c. 231, §240, 36 Stat. 1157; Feb. 13, 1925, c. 229, §1, 43 Stat. 938.*

In *Watts, Watts & Co. v. Unione Austriaca, etc.*, 248 U.S. 9, an admiralty cause, this court stated (p. 21):

> "This court, in the exercise of its appellate jurisdiction, has power not only to correct error in the judgment entered below, but to make such disposition of the case as justice may at this time require. * * * In the case at bar the rule is the more insistent, because, in admiralty, cases are tried *de novo* on appeal. *Yeaton v. United States*, 5 Cranch, 281; *Irvine v. The Hesper*, 122 U.S. 256, 266; *Reid v. American Express Co.*, 241 U.S. 544."

In *Langnes v. Green*, 282 U.S. 531 (1931), a proceeding by a shipowner to obtain a limitation of liability was brought to this court on certiorari. The court reviewed the decisions which establish that on an appeal in admiralty there is a trial *de novo*, and declared the power

of the court on certiorari to review the action of the court of appeals on the whole record. The rule in *Watts, Watts & Co. v. Unione Austriaca, etc.,* (supra) was reaffirmed (282 U.S. 537).

The reports of the decisions of this court show that although opinions in admiralty causes arising out of marine collisions were much more common in earlier years than of late, nevertheless, the court has granted certiorari in recent years in collision causes when it has been deemed necessary to review a decision of a circuit court of appeals.

Wilson v. Pacific Mail Steamship Company, (1928) 276 U.S. 454;

Southern Pacific Company v. Haglund, (1928) 277 U.S. 304;

Postal Steamship Corporation v. El Isleo, (1940) 308 U.S. 378.

C.

THE QUESTIONS PRESENTED.

The exact questions presented by this petition and upon which petitioner bases its application for a review of the decision of the Circuit Court of Appeals can be stated in the language of this court as follows:

> "Where fault on the part of one vessel is established by uncontradicted testimony, and such fault is, of itself, sufficient to account for the disaster, it is not enough for such vessel to raise a *doubt* with regard to the management of the other vessel. There is some presumption at least adverse to its claim, and *any*

> *reasonable doubt* with regard to the propriety of the conduct of such other vessel *should be resolved in its favor.*"
>
> (*The City of New York*, 147 U.S. 72, 85.)

> "As between these vessels, the fault of the Victory being obvious and inexcusable, the evidence to establish fault on the part of the Plymothian must be *clear and convincing* in order to make a case for apportionment. The burden of proof is upon each vessel to establish fault on the part of the other."
>
> (*The Victory & The Plymothian*, 168 U.S. 410, 423.)

The decision of the Circuit Court of Appeals in the instant case, as shown on the face of the majority opinion, was clearly in error and in conflict with the applicable decisions of this court, in that:

1. Although it was clear from the record and from the decision of the District Court, affirmed by the Circuit Court of Appeals, that the fault of the "Feltre" was established by uncontradicted testimony, and was sufficient to account for the collision, the majority of the Circuit Court of Appeals, nevertheless, failed to apply the above rule laid down by this court in *The City of New York* (supra), *The Victory & The Plymothian* (supra), and in numerous other decisions,* which rule required that the evidence must be clear and convincing in order to establish fault on the part of petitioner's vessel. On the contrary, the majority of the court affirmed the decision of fault against petitioner's vessel, the "Edward Lucken-

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*See authorities cited in brief.

bach", upon evidence that the court stated was in "sharp conflict", only "fairly clear", merely "persuasive" and which "may be doubted", and without the court finding any fault against petitioner's vessel based upon *clear and convincing evidence,* as required by the rule.

2. The decision of the Circuit Court of Appeals against petitioner's vessel upon evidence that the majority opinion stated was in "sharp conflict", "fairly clear", merely "persuasive", and "may be doubted", was clearly erroneous and in conflict with the applicable decisions of this court, in view of the undisputed faults of the "Feltre", established by uncontradicted testimony and sufficient to account for the collision.

3. The majority of the Circuit Court of Appeals, in confining its consideration of the case to a single issue on appeal, and in finding against petitioner's vessel on doubtful evidence, as shown by the majority opinion, violated the established principle that a trial *de novo* on an appeal in admiralty requires a full consideration of the evidence by the appellate court in order to arrive at an independent judgment. The able dissenting opinion shows the careful consideration of the evidence that is required on a trial *de novo,* but the majority opinion fails to show such consideration.

4. In view of the lack of *clear and convincing evidence* to establish fault against petitioner's vessel, as is required under the decisions of this court, the interlocutory decree of mutual fault entered by the District Court should have been modified by the Circuit Court of Appeals to exonerate petitioner's vessel, the "Edward Luckenbach", and hold the "Feltre" solely to blame for the collision.

D.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

This petition falls within the provisions of Supreme Court Rule 38, subd. 5 (b) in that:

1. The decision of the Circuit Court of Appeals on a federal question arising in an admiralty cause is in direct conflict with the applicable decisions of this court.

2. The decision is also in conflict with decisions of the United States Circuit Courts of Appeal for the Second, Third, Fourth, Sixth, and Ninth Circuits on the same matter.

3. The Circuit Court of Appeals, in rendering the decision in this case, has so far departed from the accepted and usual course of judicial proceedings on a trial *de novo* in an admiralty appeal as to call for this court's power of supervision.

The decisions that are referred to above and elsewhere in this petition are set forth in the accompanying brief.

We have also attached both opinions of the Circuit Court of Appeals in this case, in order that this court may readily contrast the able dissenting opinion of Judge Wilbur with that of the majority of the court.

The dissenting opinion correctly states the law as announced by this court and demonstrates that the majority opinion is clearly against the law.

The opinion of the majority of the Circuit Court of Appeals shows upon its face that the decision of the court was clearly contrary to the settled law as established by the decisions of this court, and shows, furthermore, that in confining its consideration to a single issue, without a

review of the entire body of the evidence in order to arrive at an independent judgment, the Circuit Court of Appeals failed to determine the appeal according to the principles of a trial *de novo* that govern in admiralty appeals.

Upon the foregoing grounds and in order to correct a decision that is manifestly unjust to petitioner, unsupported by the record and contrary to the settled law, your petitioner respectfully prays that this Honorable Court will be pleased to issue its writ of certiorari to the United States Circuit Court of Appeals for the Ninth Judicial Circuit to send to this court for its review and adjudication, the record and proceedings in the above entitled cause.

San Francisco, California,
June 8, 1942.

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